

MEMORANDUM OF AGREEMENT
STREAMLINED CONSULTATION PROCEDURE
AND COORDINATION FOR PROTECTED SPECIES AND HABITAT

**FEDERAL HIGHWAY ADMINISTRATION,
CALIFORNIA DEPARTMENT OF TRANSPORTATION,
NATIONAL MARINE FISHERIES SERVICE,
AND
CALIFORNIA DEPARTMENT OF FISH AND GAME**

Goal

This Memorandum of Agreement (MOA) provides a framework for a Pilot Program in California intended to improve the efficiency and effectiveness of Federal and State laws governing: (1) Federally listed and proposed species as well as designated and proposed critical habitat: Section 7(a)(2) and 7(a)(4) under the Endangered Species Act of 1973 as amended (ESA, 16 U.S.C. §1531-1544); (2) Essential Fish Habitat (EFH): Section 305(b)(2) consultation under the Magnuson-Stevens Fishery Conservation and Management Act (MSA, 16 U.S.C. §1801 *et seq.*); and (3) State-listed species: the California Endangered Species Act (CESA; Fish & Game Code, § 2050 *et seq.*).

The goal of the Pilot Program is to promote conservation of protected species and habitat while planning and delivering transportation projects in the Pilot Area. "Protected species and habitat" includes Federal- and State-listed and proposed species as well as designated and proposed critical habitat. Participants in this MOA include National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS), Federal Highway Administration (FHWA), California Department of Transportation (Caltrans) and the California Department of Fish and Game (CDFG), and makes provisions for cooperating with other parties. For consultations involving species that are listed under both the ESA and CESA (dually-listed), an important goal of the Pilot Program is to enable CDFG to issue a Consistency Determination (CD) on Biological Opinions (BO) as specified in Section 2080.1 of CESA. For species that are only listed under CESA, these procedures will be used to facilitate a CDFG Incidental Take Permit (ITP).

Scope

The scope of this MOA includes all Caltrans and FHWA elected projects located in the Pilot Area. Projects may include, but are not limited to, individual or program-level actions involving construction or maintenance of highway facilities, such as roads, bridges, culverts, pavement, and walls.

Pilot Area

The Pilot Area includes jurisdictional areas common to NMFS', Southwest Region, Arcata Area Office, Caltrans District 1, and CDFG Northern Region. In addition, the Pilot Area may include select projects located within Caltrans District 2.

Structure

The streamlined consultation procedure relies on three structural levels, or teams, for interagency collaboration, dispute resolution, and decision making. A roster of staff representation from each agency will be kept current. If an agency changes a representative, they will provide the name and contact information of the new representative to all participating agencies within two weeks of the change.

Level 1 Team

The Level 1 Team is the core component. It is composed of a single representative, and one alternate, from each agency. The team's role is to work together to plan and develop projects to avoid or minimize adverse effects to protected species and habitat, and identify the necessary information to initiate consultation.

The Level 1 Team will review any Caltrans or FHWA (action agencies) project plan, draft Biological Assessment (BA), Essential Fish Habitat Assessment (EFHA), or Natural Environment Study (NES). The goal of this interaction is to identify information¹ for Caltrans or FHWA to produce comprehensive documents; and facilitate and expedite issuance, when appropriate, of a BO, Letter of Concurrence (LOC), EFH Conservation Recommendation (CR), CD, or ITP. Agreements are intended to be made by consensus. All issues are expected to be aired and discussed at this level.

Level 2 Team

The Level 2 Team will ensure that the Level 1 Team has adequate resources and time to complete their duties, and set priorities for consultation efforts. They will also monitor performance of the Level 1 Team, and commit to resolving elevated issues within 30 days upon receipt of an issue statement. Level 2 Team members are composed of field unit line officers or staff supervisors with authority to direct their respective Level 1 Team representative. Unresolved issues are elevated to the Level 3 Team.

Level 3 Team

At Level 3, Regional Executives for the participating agencies provide instruction and direction in response to any unresolved issues elevated by the Level 2 Team. Executives may designate staff to assist in issue resolution.

¹ The term "information", as used in this MOA, refers to the "best scientific and commercial data available" referenced in ESA Section 7(a)(2); "best scientific and other information that is reasonably available" at 14 CCR Section 783.2(b) under CESA; and "best scientific information available" at 50 CFR § 600.920 (d) governing MSA.

Streamlined Consultation Procedure

The Streamlined Consultation Procedure includes early involvement, four phases, and issue elevation.

Early Involvement

Participating agencies commit to interagency communication, coordination, and collaboration prior to and during project planning and development. Early planning may also include discussions with other relevant state and federal agencies such as the U.S. Army Corps of Engineers, California Coastal Commission, and Regional Water Quality Control Board. The Level 1 team should discuss transportation plans, project priorities, and upcoming actions and consultations; and regularly review the current status and potential impacts of project plan options on protected species and habitat in the Pilot area.

Phase 1: Review and Discuss Draft BA, EFHA or NES

The role of the Level 1 Team is to review and discuss any draft BA, EFHA, or NES to reach consensus on the necessary information. The Level 1 Team will meet on a regular and ad-hoc basis and carefully examine proposed actions to determine the effects on protected species or habitats. The team will also recommend or evaluate measures to avoid, minimize, or fully mitigate (where applicable under CESA) adverse affects to protected species and habitats. As needed and appropriate, the team will confer with other state and federal agencies. As a result of Phase 1, the Level 1 Team agrees, by consensus, on the information to be included in the final BA, EFHA, or NES.

Phase 2: Prepare Final BA, EFHA, NES, or ITP Application

The action agency will prepare a final BA, EFHA, NES, and, if appropriate, an ITP application, based on the results of Phase 1. Level 1 Team members should continue to work together to further refine information needs, as needed. The action agency will submit the final BA and final EFHA along with a written request for consultation to NMFS, and, if appropriate, an ITP Application to CDFG. The submittal package will reflect the results of Level 1 Team discussions and agreements.

Phase 3 - Prepare LOC, BO, EFH CR, or ITP

NMFS will issue a LOC within 30 days upon receipt of a written request for informal consultation in which the final BA bears a “not likely to adversely affect” determination. NMFS will issue a BO, within the 135-day timeframe as defined in the ESA, upon receipt of a final BA bearing a “likely to adversely affect” determination. If EFH consultation is conducted concurrently with ESA consultation, NMFS will issue any EFH CR concurrently. However, the action agency may request to receive EFH CR earlier, consistent with applicable regulation.

NMFS retains responsibility to develop reasonable and prudent measures (RPM) and terms and conditions to avoid or minimize incidental take. Likewise, NMFS retains responsibility to develop reasonable and prudent alternatives (RPA) to avoid jeopardizing the continued existence of the species, or destroying or adversely modifying designated

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critical habitat. Any draft RPAs or draft RPMs contemplated by NMFS will be shared and discussed with the Level 1 Team prior to issuance of the BO.

After receiving a complete application, CDFG will prepare and issue a single ITP for the project covering state-only listed species. CDFG will commit to issuing an ITP within the 150-day timeframe identified under CESA.

Phase 4 – Issue CD or Respond to EFH CR

After receiving a BO for one or more dually-listed species, Caltrans may submit a written request for a CD to CDFG. The request, along with a copy of the associated BO, must be sent to the director of CDFG. CDFG will make a consistency determination within 30 days following receipt of the request in accordance with the procedures and criteria specified in CESA. The action agency will respond in writing to NMFS regarding any EFH CR.

Issue Elevation

If an issue cannot be resolved by the Level 1 Team, or guidance is needed, the issue will be elevated to the Level 2 Team. Level 1 Team members serve as advisors to the Level 2 Team by preparing a joint issue statement describing the issue, and background information. Preparation of the joint issue statement will not take longer than 15 days from identification of an impasse. The Level 1 Team should elevate an issue when consensus cannot be reached regarding the information in a BA, EFHA, or NES; determination of effect; or adequacy of avoidance, minimization, or mitigation measures. In addition, matters should be elevated related to questions about relevant law, regulation, or policy. Guidance can be sought about financial assurances required under CESA; or when direction is desired concerning consultation schedule or priority. The Level 2 Team will commit to respond to any elevated issue statement within 30 days. If consensus cannot be reached by the Level 2 Team, the issue will be elevated to Level 3 (Regional Executives). The Regional Executives, or their designees, acting collaboratively, commit to provide direction.

Authority

Endangered Species Act of 1973, as amended (16 U.S.C. 1531-1544)
Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*)
California Endangered Species Act of 1984, as amended (F.G.C. §2050 *et seq.*)

Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). The 2005 Federal transportation program reauthorization includes programs under which California became eligible to assume FHWA responsibilities under the National Environmental Policy Act (NEPA), the ESA, and other Federal environmental laws (23 U.S.C. 326, 23 U.S.C. 327). Caltrans assumed those responsibilities for most highway projects in the state. Caltrans, in essence, serves as the federal action agency (*i.e.* FHWA) for those projects where it assumed responsibility.

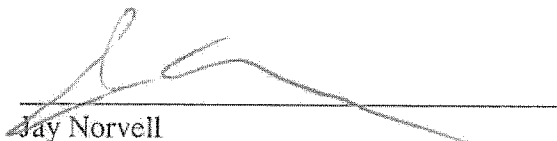
Pursuant to the Anti-Deficiency Act (31 U.S.C. Section 1341), nothing in this MOA shall

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be construed as obligating any of the parties to the expenditure of funds in excess of appropriations authorized by law. The level of resources to be expended under this MOA will be consistent with the level of resources available to the agencies to support such efforts.

Effective Date

This MOA is effective immediately upon signature of all participating agencies. Its provisions will remain in effect until it is amended, superseded, or revoked.

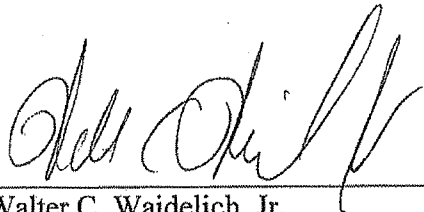


Jay Norvell
California Department of Transportation
Chief, Division of Environmental Analysis

C-24-2010

Date

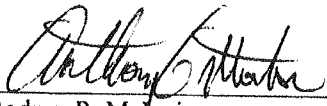
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Walter C. Waidehlich, Jr.,
Division Administrator
Federal Highway Administration

14 July 2010
Date

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Rodney R. McInnis
Regional Administrator
National Marine Fisheries Service, Southwest Region

5/24/2010
Date

U.S. Department of Commerce, National Oceanic and Atmospheric
Administration, NOAA-NMFS-SWR-2009-S113

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Mark C. Stopher

Acting Regional Manager

California Department of Fish and Game, Northern Region

7/29/2010
Date